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Supreme Court, U.S.
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No. 03-984

In the Supreme Court of the United States

RICHARD A. BALSER AND CORINNE L. BALSER,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE AND
OFFICE OF THE UNITED STATES TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' suit against the Department of Justice and the Office of the United States Trustee for monetary damages and equitable relief arising from a closed bankruptcy proceeding is barred by sovereign immunity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-43) is reported at 327 F.3d 903. The opinion of the district court granting the motion to dismiss (Pet. App. 51-52) and the order of the district court denying reconsideration (Pet. App. 48-49) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 29, 2003. A petition for rehearing was denied on July 9, 2003 (Pet. App. 44). The petition for a writ of certiorari was filed on October 7, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1978, Congress established the United States Trustee Program to improve the administration of bankruptcy cases. See 11 U.S.C. 1104. Twenty-one United States Trustees oversee bankruptcy cases within specified geographic areas. 28 U.S.C. 581(a). To remove any appearance of bias, Congress provided that the United States Trustees would not operate under the direct supervision of the bankruptcy court. Instead, the Trustees are "executives of the bankruptcy network," responsible for "protecting the public interest and ensuring that bankruptcy cases are conducted according to law." H.R. Rep. No. 595, 95th Cong., 2d Sess. 88-99, 109-110 (1977). As such, the United States Trustees hold a status that Congress compared to that of a prosecutor. *Id.* at 110; see *id.* at 88 (United States Trustees "serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena"). The United States Trustees are Justice Department officials and are appointed by the Attorney General. 28 U.S.C. 581-589. They "may raise and may appear and be heard on any issue in any case or proceeding under" the Bankruptcy Code. 11 U.S.C. 307.

2. A creditor initiated involuntary bankruptcy proceedings against petitioners, which subsequently were converted into a voluntary Chapter 11 reorganization proceeding. See 11 U.S.C. 1101 *et seq.* During that proceeding, petitioners stipulated to the entry of an order by the bankruptcy court directing the United States Trustee to select an examiner under 11 U.S.C. 1104(d), who would have the power to manage the petitioners' real properties and to seek approval of their sale. Pet. App. 33; see also 11 U.S.C. 1106(b)

(specifying an examiner's duties). The United States Trustee nominated an examiner and, after notice and a hearing, the bankruptcy court approved the appointment, pursuant to 11 U.S.C. 1104(d). See Pet. App. 33.

The creditor subsequently sought relief from the automatic stay, under 11 U.S.C. 362(d), so that it could foreclose on its secured claims against petitioners' real property. The examiner filed a motion seeking approval of the sale of the real property for $1,592,500, free and clear of all liens, pursuant to 11 U.S.C. 363. After notice to all creditors and parties in interest, the bankruptcy court granted the creditor's motion and approved the sale of the real property. Pet. App. 33-34. The bankruptcy court overruled petitioners' objection to the terms of the sale. *Id.* at 34. Petitioners filed a notice of appeal from the bankruptcy court's order, but they failed to prosecute their appeal, resulting in its dismissal. *Ibid.* Three years later, the bankruptcy court approved petitioners' plan for reorganization and the bankruptcy proceeding was closed. *Id.* at 34, 55.

Eight months after the bankruptcy proceeding closed, petitioners contacted the United States Trustee to complain about the examiner's conduct in selling their real property. Pet. App. 34. The United States Trustee conducted an investigation and found no evidence of fraud or other wrongdoing.

3. Petitioners filed suit, pro se, in federal district court against the United States Department of Justice and the Office of the United States Trustee, alleging that the United States Trustee had "acted negligently and fraudulently in connection with the appointment and supervision of the examiner." Pet. App. 34. More specifically, petitioners' amended complaint alleged that the examiner had colluded with the buyer's

attorney and had sold the properties at below market value. *Ibid.* The complaint further asserted that the United States Trustee knew of the alleged conflict of interest and fraudulent conduct but nevertheless "failed to follow its statutory duty to supervise the administration of [petitioners'] estate in a manner that protected the [petitioners'] interests." *Id.* at 35. Petitioners also asserted violations of their Fifth, Seventh, Ninth, and Fourteenth Amendment rights. Petitioners seek injunctive relief and $5 million in damages. *Ibid.* The complaint did not name the buyer, examiner, or any individual government official as a defendant.

After allowing petitioners to amend their complaint, the district court granted the government's motion to dismiss. Pet. App. 51-52. The court held that the Department of Justice and the Office of the United States Trustee were immune from suit under established principles of sovereign immunity. *Id.* at 52. The court further held that, "[e]ven were the Court to construe [petitioners'] pleadings to infer a suit against the Trustee individually, the Trustee would be protected from liability for the alleged actions of business mismanagement by judicial immunity." *Ibid.*

4. A unanimous court of appeals affirmed. Pet. App. 32-43. The court first held that petitioners' complaint "plainly states a cause of action against the United States" only. *Id.* at 36. The court then rejected petitioners' argument that Section 106(a) of the Bankruptcy Code, 11 U.S.C. 106(a), waived the United States' sovereign immunity from a civil suit for damages and injunctive relief. The court of appeals recognized that Section 106(a) expressly waives sovereign immunity for "governmental unit[s]" involved in certain proceedings under the Bankruptcy Code. Pet. App. 37. But, the court emphasized, the Bankruptcy Code exempts "a

United States trustee while serving as a trustee in a case under this title" from that waiver of immunity. *Ibid.* (quoting 11 U.S.C. 101(27)).

The court of appeals also rejected petitioners' contention that the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, provides the necessary waiver of sovereign immunity. The court noted first that petitioners had not invoked the Federal Tort Claims Act in the district court and thus had waived that argument. Pet. App. 37-38. The court further held that, in any event, any claim under the Federal Tort Claims Act would implicate "quintessentially acts of discretion within the meaning of the [Federal Tort Claims Act's] discretionary function exception." *Id.* at 38-39.

The court found petitioners' reliance on *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to be unavailing for two reasons. First, petitioners had failed to name any government official in his individual capacity as a defendant. Pet. App. 39 & n.4. Second, the court held that any claim under *Bivens* would have been futile because the United States Trustee would have been entitled to absolute judicial immunity for his actions. *Id.* at 41. In so holding, the court reasoned that the United States Trustee had "assume[d] the judicial functions historically vested in bankruptcy and district courts" and "performs many of the functions that had been assigned previously to the bankruptcy judge." *Ibid.*

Finally, the court of appeals held that many of the alleged missteps by the United States Trustee, such as the appointment of the examiner and the sale of the real properties, were "approved by the bankruptcy court." Pet. App. 42. Those bankruptcy proceedings "addressed and satisfied" petitioners' constitutional rights

in the bankruptcy process. *Ibid.* If petitioners disagreed with the bankruptcy court's rulings, the court explained, the proper course was to appeal those rulings, but petitioners "voluntarily elected to abandon their appeal" instead. *Id.* at 43 n.6. Confirmation of the reorganization plan thus barred, under principles of res judicata, any claims that petitioners could have pressed in the bankruptcy proceedings. *Ibid.*

ARGUMENT

The judgment of the court of appeals dismissing the case on sovereign immunity grounds is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' record-bound collateral challenge to completed bankruptcy proceedings does not otherwise merit an exercise of this Court's certiorari jurisdiction.

1. Petitioners seek (Pet. 6-14) this Court's review of the court of appeals' judgment that the Bankruptcy Code did not abrogate the United States' immunity from a private civil suit for monetary damages and equitable relief. Petitioners, however, identify no conflict in the circuits on that question or any conflict between the court of appeals' ruling and this Court's precedent that merits this Court's resolution. Nor is the United States aware of any such conflict.

In any event, the judgment of the court of appeals is correct. Petitioners filed suit solely against the United States Department of Justice and the Office of the United States Trustee as official components of the United States government. The United States government, however, is immune from suit unless it has expressly waived its sovereign immunity. See *Department of Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260

(1999); *Department of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992).

Petitioners first contend (Pet. 7) that Section 106(a) of the Bankruptcy Code contains the necessary waiver of sovereign immunity. That Section abrogates sovereign immunity for a "governmental unit to the extent set forth in this section" with respect only to specified provisions of the Bankruptcy Code. The court of appeals held that the waiver of sovereign immunity did not apply because "governmental unit" is defined to exclude the "United States trustee while serving as a trustee in a case under this title." 11 U.S.C. 101(27). Petitioners (Pet. 7-9) argue that the court of appeals erred because the United States Trustee was not, in fact, actually "serving as trustee" in petitioners' bankruptcy proceedings.

That argument is of no help to petitioners. Even if the limitation on the waiver of sovereign immunity applies only when a United States Trustee performs the functions of a traditional private trustee in a bankruptcy case, petitioners' post-bankruptcy, civil damages litigation does not fall within the scope of Section 106(a)'s waiver of sovereign immunity for bankruptcy proceedings. A statutory waiver of sovereign immunity must "be strictly construed, in terms of its scope, in favor of the sovereign." *Blue Fox*, 525 U.S. at 261. The waiver in Section 106(a) is, by its terms, expressly restricted to claims arising under sixty specific sections of the Bankruptcy Code.[1] Petitioners' civil litigation does not fall within any of those enumerated Sections.

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[1] Section 106(a) provides:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to

Furthermore, even where the United States has generally waived its sovereign immunity from suit, the availability of monetary relief depends upon an additional express and particularized waiver by Congress. See, *e.g.*, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34-37 (1992) (monetary claims unavailable). This Court has been "particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for" "monetary exactions." *United States* v. *Idaho*, 508 U.S. 1, 8-9 (1993). Section 106(a)(3), however, authorizes courts only to "issue against a governmental unit an order, process, or judgment *under such sections [of the Bankruptcy Code] or the Federal Rules of Bankruptcy Procedure*, including an order or judgment awarding a money recovery, but not including an award of punitive damages." 11 U.S.C. 106(a)(3) (emphasis added). Petitioners' case was not brought in bankruptcy court and does not seek relief under any "such sections" of the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

Petitioners' claim (Pet. 15-17) that sovereign immunity was waived by the participation of the Internal Revenue Service in the bankruptcy proceedings overlooks the fact that the waiver of sovereign immunity in Section 106(b) pertains only to claims filed by the governmental unit *in the bankruptcy court* and arising

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the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

out of the "same transaction or occurrence out of which the claim of such governmental unit arose." 11 U.S.C. 106(b). Damages arising from the alleged failure of the United States Trustee to supervise an examiner have no conceivable nexus to any claims advanced by the Internal Revenue Service during petitioners' bankruptcy proceedings.[2]

2. Petitioners separately argue (Pet. 14-15) that sovereign immunity should not bar their claim for injunctive and declaratory relief. That argument fails for two reasons. First, sovereign immunity "shields the Federal Government and its agencies from *suit*," not just from monetary liability. *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) (emphasis added). While such immunity does not generally extend to actions against federal officials, see *Ex parte Young*, 209 U.S. 123 (1908), petitioners have not named any individual federal officers as defendants.[3]

Second, petitioners lack standing to seek such equitable relief. The complaint contains no allegation of ongoing illegality relevant to any protected legal in-

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[2] In addition to lacking the requisite waiver of sovereign immunity, nothing in the Bankruptcy Code or any other source of law of which the United States is aware creates a separate civil cause of action for damages or injunctive relief against the United States arising out of alleged missteps in bankruptcy proceedings.

[3] It is doubtful that a suit would lie even if petitioners had named an individual official in light of both the absence of any allegation of ongoing unlawful conduct and the comprehensive remedial scheme already provided by the Bankruptcy Code for claims timely raised while those proceedings are ongoing. See *Seminole Tribe* v. *Florida*, 517 U.S. 44, 74-75 (1996) (holding that *Ex Parte Young* suits are impliedly barred by Congress's enactment of a detailed remedial scheme and when the relief sought can only be provided by the sovereign *qua* sovereign).

terest held by petitioners. Nor does the complaint allege that petitioners will be involved in any type of bankruptcy proceedings, let alone those involving the active participation of a United States Trustee, at any time in the foreseeable future. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983) (where a plaintiff "has made no showing that he is realistically threatened by a repetition of his experience * * *, then he has not met the requirements for seeking an injunction in federal court, whether the injunction contemplates intrusive structural relief or the cessation of a discrete practice"); *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969) (where it is "most unlikely" that a plaintiff would again be subject to the operation of a statutory scheme, no case or controversy of "sufficient immediacy and reality" exists to permit declaratory relief). Indeed, petitioners' inability to establish irreparable injury—"a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff[s] will be wronged again"—forecloses any claim for equitable relief on its merits.

3. Petitioners also seek (Pet. 12-13, 22-23) this Court's review of the court of appeals' holding that the challenged actions of the United States Trustee fall within the Federal Tort Claims Act's (FTCA) exemption for discretionary functions. See Pet. App. 38 (citing 28 U.S.C. 2680(a)). That fact-bound claim does not merit this Court's review and, in any event, is incorrect for three reasons.

First, petitioners never invoked the FTCA as a basis for relief either in their complaint or in district court. The argument therefore was waived, as the court of appeals held. Pet. App. 38.

Second, petitioners have failed to allege before any court, including this Court, that they satisfied the

FTCA's administrative exhaustion requirement, see 28 U.S.C. 2675(a). That requirement is jurisdictional. See *McNeil* v. *United States*, 508 U.S. 106, 112 (1993).

Third, the court of appeals was correct (Pet. App. 38) in holding that any attempt by petitioners to amend the complaint to add an FTCA claim would be futile. Petitioners' claim for relief turns upon the United States Trustee's "alleged negligence in his general duties of selecting, monitoring, and investigating the examiner appointed in this case," and those actions are "quintessentially" matters of discretion "within the meaning of the FTCA discretionary function exception." *Id.* at 38-39; see also *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813-814 (1984).

Petitioners' reliance (Pet. 13) on *Berkovitz* v. *United States*, 486 U.S. 531 (1988), is misplaced because the Trustee has no non-discretionary duty to supervise and investigate examiners. While the United States Trustee nominates a person to serve as examiner "after consultation with parties in interest," 11 U.S.C. 1104(d), the formal selection of the examiner is by the bankruptcy court. Furthermore, nothing in the Bankruptcy Code charges the United States Trustees with supervising examiners once they are appointed by the court. See 11 U.S.C. 1106 (powers of examiners). To the contrary, examiners' powers and compensation are set by the court. 11 U.S.C. 330(a)(1), 1106(b). While 28 U.S.C. 586 vests the United States Trustee with the authority to "supervise * * * the administration of cases and trustees," that assignment is couched in the broadest of discretionary terms. See 28 U.S.C. 586(a)(3) (United States Trustee shall "supervise the administration of cases and trustees in cases under chapter 7, 11, 12, or 13 of title 11" by engaging in certain tasks "whenever the

United States trustee considers it to be appropriate").[4] The Trustee's statutory duties thus involve "an element of judgment or choice"; the statute does not "specifically prescribe[] a course of action for an employee to follow." *Berkovitz*, 486 U.S. at 536.

4. Finally, petitioners' failure to contest the real estate sales or any actions of the United States Trustee prior to the closure of the bankruptcy proceedings and the court's adoption of the reorganization plan forecloses this collateral attack. See 11 U.S.C. 1141(a) ("[T]he provisions of a confirmed plan bind the debtor."); see also *Trulis* v. *Barton*, 107 F.3d 685, 691 (9th Cir. 1995) ("Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to res judicata effect."); 5 *Collier on Bankruptcy* ¶ 1141.01[1], at 1141-3 (Lawrence P. King ed., 15th ed. 1995). As the court of appeals correctly held, petitioners' claims arising out of the conduct of the bankruptcy case are barred because "[t]he confirmed plan acted as res judicata as to claims that could have been raised in the bankruptcy proceedings, but were not." Pet. App. 43 n.6.

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[4] See also 28 U.S.C. 586(a)(3)(G) (empowering the United States Trustee, "whenever" he or she "considers it to be appropriate," to monitor the progress of cases under Title 11 and take "such actions as the United States trustee deems to be appropriate to prevent undue delay in such progress"); 28 U.S.C. 586(a)(3)(H) (allowing the United States Trustee, "whenever" he or she "considers it to be appropriate," to monitor applications under Title 11 "and, whenever the United States trustee deems it to be appropriate, [to] fil[e] with the court comments with respect to the approval of such applications").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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REPLY

BRIEF

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To The Ninth Circuit Court Of Appeals

PETITIONERS REPLY IN REBUTTAL T O RESPONDENTS OPPOSITION

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REPLY TO BRIEF IN OPPOSITION
PETITIONERS' REBUTTAL

INTRODUCTION

The Petition For Writ of Certiorari raises Federal questions, including several of *first impression* in the Ninth Circuit, concerning the sovereign immunity of the Department of Justice and the Office of the United States Trustee. For this reason the Court is asked to review the original "Questions Presented For Review" as presented on the first page of the Petition For Writ Of Certiorari, as a supplement to the "Question Presented" in the Respondents' Brief.

The Court is further asked to note that this case centers on an extreme loss of the principal value of an estate while under the direct control of the United States Trustee, despite oversight and approval by the Court, but wherein:

1. Land titles signed off by the U.S. Trustee-appointed Examiner for $1.4 Million were then resold for a net gain of $5 Million;

2. In the Examiner's filing, the appraisal, purchase values and document preparations were provided through a single attorney. This attorney was employed by the Examiner and by the Purchaser at the same time (an unconscionable conflict of interest);

3. The Examiner was brought into the Ch 11 process by way of a Petitioner signed stipulation to take over rental property management, and to concurrently help Petitioners with rezone, easement, road dedications, and sales activities, with terms subject to further agreement by Petitioners.

4. The Court's later order, issued without notice or hearing on the U.S. Trustee's agenda for another topic, authorized the Examiner to sign off all closing documents on behalf of, but without participation by, the Petitioners. This was a shocking disregard and violation of several statutes.

5. The IRS, having filed BAR claims totaling $322,414 is regarded by Petitioners as having shared responsibility for

the expediencies and abruptness advocated by the U.S. Trustee in facilitating the loss of assets at liquidation values despite the Ch 11 status of the estates. (Individuals within the IRS have been more helpful and even encouraged waiver of some penalties, but then several of these never materialized. A March 15, 2004 notice for a refund of $7,567.75 from tax year 1997, was a most recent notice.)

This Reply is submitted to better address the Respondent's Brief (hereinafter "RB") as to its content, implications, and conclusions. References will be made directly to the RB by both Section (or paragraph) number and page number to facilitate reference to the item or statement being clarified.

CLARIFICATIONS WITHIN STATEMENT

Petitioners emphasize that the purpose of Congress in creating the Office of the United States Trustee as explained in RB 1, pg 2, was "To remove any appearance of bias...." Also noted therein was that the Trustees are "executives of the bankruptcy network," responsible for "protecting the public interest and ensuring that bankruptcy cases are conducted according to law." Additionally, Trustees were to "serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena."

Clearly, the Petitioners' case is the direct result of the failure of the U.S. Department of Justice and the Office of U.S. Trustee to provide programs and procedures in a manner necessary to accomplish this purpose and to fulfill each officer's responsibilities and obligations in the proceedings below.

In RB 2, pg 2, Respondents misstate the reference to the stipulation executed by Petitioners. This contract between the Petitioners (Balsers, as the debtors) and the creditor (CGA) that filed the involuntary bankruptcy actions against the Balsers provided "...hereby stipulate that a manager shall be appointed to manage the rental properties securing CGA's deeds of trust...subject to reasonable approval by the debtors...an

Examiner be appointed by the court for the limited purpose of managing the rental properties."

The Court later granted its "Order Appointing Examiner With Expanded Powers" which covered the rental property management under "Powers and duties which are exclusive to Examiner" and provided further assistance and support to Balsers under:

"Powers and duties which are concurrent with Debtor-in-Possession: To undertake such actions as are reasonable and necessary to fulfill the conditions of the rezone decision and to segregated the properties zoned PCB, PRD-MR and LDMR therein including but not exclusively to seek approval...make application for...dedicate new roads...enter into and effectuate agreements...further to seek approval of a sale...under 11 U.S.C. § 363...."

One month later the United States Trustee filed an "Application For Order Approving Appointment Of Chapter 11 Examiner," which stated in part: "The United States Trustee has appointed Perry Stacks as Examiner in the above - captioned case." The Application further stated: "...Mr. Stack's connections with the debtors, creditors, any other parties in interest, their respective attorneys and accountants, the United States Trustee, and persons employed in the Office of the United States Trustee are limited to the connections set forth in the Examiner" Acceptance and Declaration. WHEREFORE, Applicant requests that the Court enter an Order approving the appointment of Perry Stacks, as the Chapter 11 Examiner in above-captioned case." The Court thereupon granted its "Order Approving Appointment...."

The Petitioners, as then debtors-in-possession, had received no notice that Examiner Perry Stacks simultaneously served as private trustee on another judge's case in which *the eventual buyer's counsel also served as trustee Stacks' own attorney.* Nor could Petitioners have possibly anticipated that its Stipulation could result in the *Examiner's secret negotiation and filing of a sale contract for 80% of the estate's real estate assets without Petitioner's review, or even a notice* - and then

be construed to allow the *Examiner to sign a deed transferring ownership from the Balsers, again without notice or a hearing and without the faulting of Debtor-in-Possession prior to the granting of the Court's authorization so to do.*

This last breach of the law effectively transferred property rights of ownership from Petitioners to the Examiner, much as a quasi-trustee, but *apparently void of any corresponding fiduciary responsibilities.* Petitioners contend that this Court action thereby violated 11 U.S.C. § 321(b), § 1106(b) and § 1107(a) by the removal of the debtors-in-possession from control of the estates' real property assets. (This latter Court action was performed during a non-related court session scheduled by the U.S. Trustee on a different topic.)

Another serious misrepresentation by Respondents is their negative comment in RB 2, pg 3, in reference to the appeal filed by Petitioners: "...but they failed to prosecute their appeal, resulting in its dismissal." In fact, *the appeal was filed on July 1, 1996.* Petitioners' efforts to perfect such an appeal of the sale was ultimately concluded on October 5, 1997, by the Court's sua sponte entry of an oral order appointing a trustee following Petitioner's introduction of evidence confirming the purchaser's breach of the purchase agreement for the remaining 20% of adjoining property. This late morning appointment violated 11 U.S.C. § 1104 and 1107, in that there was *no notice, no hearing, and no cause as to incompetence to justify the removal of the Debtor-in-Possession.* By mid-afternoon the Court's withdrawal of the oral order prior to its consummation was met as negotiated immediately following the morning hearing on the condition that the property transfer deeds, releases, and stipulation for an order to dismiss the appeal would first be executed by Petitioners within a two-hour window. The alternative would have been conversion to Chapter 7 and resolution of the real estate sale and termination of the appeal being handled by a newly assigned trustee. Petitioners' capitulation and forced concession in executing the stipulation should certainly not be characterized as "but they

failed to prosecute their appeal…" as presented by Respondents above.

The RB 2, pg 3, explanation of the motion filed by the Examiner to seek approval of the sale of real property correctly reported that "the bankruptcy court granted the creditor's motion and approved the sale of the real property." What is not explained is that the creditor and purchaser at that time had a secret agreement and had negotiated the sale and prepared all the sale documents for execution and filing by the Examiner *without review or concurrence by the Petitioners.* The file code on the computer generated Examiner's documents was the same as the attorney's code for the purchaser's correspondence. *This was the same attorney employed by the Examiner on a bankruptcy case being processed simultaneously under another judge.* With such a gross conflict of interest where is the Department of Justice and Office of the United States Trustee on the appearance of fairness issue now?

The argument is not whether sovereign immunity ever applies, but rather *does it apply* in this case despite the very specific waivers?

In RB 4, pg 4, the clear error in the decision of the Ninth Circuit Court of Appeals centers on its misinterpretation of Section 106(a). Petitioners' named the Department of Justice and Office of the United States Trustee as defendants. Both entities are "governmental units" covered under the abrogation of sovereign immunity as stated under this code *and* the United States Trustee is also a "governmental unit" when not serving as a private trustee (as in a Chapter 7 bankruptcy). Furthermore, the U.S. Trustee is precluded from serving as trustee in a Chapter 11 case by 11 U.S.C. Section 1104(d) which requires that the "United States trustee...shall appoint...one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case." The exception claimed by the Ninth Circuit "unanimous court of appeals" affirmation thereby attests to the violation of this code even with regard to their "preferred" extension of the statutory exclusion. If such a policy is upheld

then this Court is asked to consider such an application to be a further indictment of the Office of the United States Trustee itself.

It is well noted that the Respondents do not present the Respondents' own interpretation of Section 106(a) but rather carefully only quote the error made by the Ninth Circuit as though it could be applicable. This Court is asked to make its own interpretation and to rule accordingly.

The RB 4, pg 5, statement by Respondents defend the ruling below that the application of the Federal Tort Claims Act is waived if not timely invoked by Plaintiffs in the District Court. Certainly, the actions and behavior were described as wrongdoings therein, but the pro se recognition as to a particular area of law was admittedly lacking. Yet the District Court's instructions followed in filing the claims did not prepare the Petitioners for this requirement. The Respondents' reference to Bivens restates the lower court's view that the application of "judicial immunity" is not situation dependent, but rather is justified by job title alone. Petitioners believe that this directly conflicts with earlier Supreme Court holdings as to judicial immunity only applying to judicial functions, not also to administrative acts or responsibilities under a job title position.

The last paragraph of RB 4, pg 5, relies on the Ninth Circuit view that those proceedings "approved by the bankruptcy court" are thus made pure, rightful and acceptable. By this analysis one judge's misdirection, oversight, error, or ignorance, overrules all statutory laws and constitutional rights. These prevalent issues in our justice system are why Petitioners are now before this Court! Of course, it is clear that Petitioners did, in fact, file and maintain appeals throughout the wrongful land sale processes. And, until foreclosed upon by the court's oral appointment of a trustee, and forced execution of the final stipulation for order of dismissal so as to regain Petitioners' status and authority as Debtor-in-Possession, Petitioners did maintain working toward eventually achieving a successful reorganization and final decree. As to any effect of res judicata

based upon the confirmed reorganization plan, there has never been a final decision on the issues timely raised and claims pressed during the bankruptcy proceedings, because they were never litigated, and the approved plan specifically includes and provides for the waiver of any preclusion based upon plan approval so as to recover the losses suffered.

CLARIFICATIONS WITHIN ARGUMENT

The Respondents state their support of the Ninth Circuit Court of Appeals dismissal based upon sovereign immunity. Petitioners assert that the position taken by both the Respondents and the court below are not justified by the code. The issue comes down to interpretation of a single phrase under 11 U.S.C. § 106(a). The Petitioners provided a detailed analysis (Pet.7-9). The abrogation of sovereign immunity of the United States Trustee in a Chapter 11 Bankruptcy case is supported by both the terminology used and the intent of the legislature which produced it. The lower court did not address the abrogation of sovereign immunity clearly stated therein with respect to the defendants, Department of Justice and Office of the United States Trustee. The Petitioners contend that sovereign immunity is not a legitimate defense in this case.

RB-Arg-1, pg 6, further states that no "... conflict exists with this Court or with any other court of appeals." This finding supports Petitioner's contention that this is correctly a case of first impression that deserves to be resolved by the Supreme Court. The United States government has expressly abrogated its sovereign immunity in this case by statute. This Court should want the "first decision" to be a correct one. To allow otherwise is simply building case law on a foundation of sand that must ultimately collapse.

As to Respondents' further contention (or hope) that Petitioners' claims cannot be related to any of the enumerated Sections, this suggestion is defeated by review of the following Sections which Petitioners contend present or contain applicable provisions:

Title 11, Sections: 105, 106, 108, 303, 346, 362, 363, 364, 365, 502, 503, 505, 506, 510, 522, 523, 524, 1107, 1141, 1142, 1143, and 1146.

Respondents proceed under RB-Arg-1, pg 8, to search out another escape route, "...even where the United States has generally waived its sovereign immunity from suit..." by referencing liability for "monetary exactions". The court is reminded that the sale of Petitioners' property for $1,592,500 by the Examiner, who signed off the deed in a quasi-trustee action on a sua sponte court authorization without due process for notice or hearing at which Petitioners, as debtors-in-possession, (and with a higher priced offer already in hand), could have otherwise objected, but instead resulted in a land resale after one year capital gains tax qualification for a sale price of $7,752,000. The net gain based upon real estate excise tax statements was near $5,000,000. This amount represents the net loss in equity to Petitioners and is therefore the basis for recovery by way of this case.

RB-Arg-1, pg 8, in the last paragraph the Respondents appear to challenge those claims filed by the IRS against estate assets during the bankruptcy. However no review was made in the court below to confirm whether the claims filed arose out of the "same transaction or occurrence out of which the claim of such governmental unit arose." Certainly, the tax liabilities on gains and losses competed with fees and charges by the U.S. Trustee for timely payment. The Court's rush toward liquidation of Debtor's assets at a one quarter of fair market value is attributed by Petitioners to factors which include the combined negative demands presented to the court by counsels representing both the U.S. Trustee and the IRS. The very clear nexus to Petitioners' claims are certainly related to case management by the U.S. Trustee, the Examiner, and the IRS counsel, and their being represented during the court proceedings and hearings as the government's own experts.

A yet to be resolved issue still exists between Petitioners and several of the original claims holders, including the IRS. Petitioners' assets and liabilities before bankruptcy were taken

over by the formation of the estates in which the Examiner, as directed by the U.S. Trustee and encouraged by other government claims holders including the IRS, squandered assets and left most of the original (unsecured) claims not paid or even addressed. These failures in integrity and fiduciary responsibilities can only be cured now by either injunctive or declaratory relief (as best understood by the pro se Petitioners). Those responsible should be held accountable for these adverse consequences of their actions (and inactions).

The Respondents challenge in RB-Arg-2, pg 9, against Petitioner's standing to seek equitable relief as presented. But the "allegation of ongoing illegality..." relates to the total failure of justice and the risk to our national security because of the failure of government agencies in both the Executive and Judiciary branches to endorse and pursue integrity, responsibility and accountability throughout their respective operations.

CONCLUSION

The issue brought to the Supreme Court by this case purports to challenge concepts. Similarly, a Bivens action against Examiner Perry Stacks or U.S. Trustee attorney Gail Geiger would do nothing toward making the Office of the United States Trustee and Department of Justice revise their handling of ALL Chapter 11 bankruptcies in which the current abusive system results in the raiding of assets by unconscionable trustees and their counsels, and misdeeds by other exploitive operaters in the business world.

Certainly, the Petitioners would like to recover their $5,000,000 lost while under the surveillance of the U.S. Trustee and influence of the IRS. Our loss of retirement assets at age 73 is not reassuring. It was not right, nor just, and certainly was not necessary.

Better yet would be the impact that a favorable decision by this Court could have upon reintroducing justice into Chapter 11 proceedings, and perhaps into all bankruptcy proceedings,

by declaring that *integrity and fiduciary responsibility* are essential elements necessary to avoid further victimization of bankruptcy participants and to preserve their civil rights, and that *accountability* must prevail to assure such implementation.

The best result (and most ambitious goal) would be the adoption of the principle that freedom, as promoted world wide by the United States, seeks to secure the blessings of Liberty by ensuring that integrity, responsibility and accountability prevail throughout the private, the public, and business sectors and, by example, under all three branches of our government.

Yes, with our own lives and 17 children, grandchildren and great-grandchildren, as the Petitioners we believe we have a very direct basis for seeking injunctive, declaratory, or other equitable relief. All members of our American society are threatened by the extent of bankruptcy court abuse and corruption now prevalent. (See Appendix A).

Petitioners believe that the Petition, as supplemented by this reply, adequately rebuts all arguments presented by Respondents, and respectfully request this Court's granting for the Writ of Certiorari.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of April, 2004.

Petitioner: Corinne L. Balser
Corinne L. Balser

Petitioner: Richard A. Balser
Richard A. Balser

APPENDIX
INDEX TO CURRENT CASES

Similar failed cases under wrongdoings by the Office of the United States Trustee are also known to Petitioners; examples are as follows:

In re Linda L. Fogh, in U.S. District Court, Western District of Washington at Seattle, Case 99-00251-SS
Lack of jurisdiction in underlying cases; abuse of bankruptcy process; Alleged bribe paid to bankruptcy judge's relative to cover up void judgments; Partnership ignored and property sold well below fair market value.

In re James Keenan, in U.S. District Court, Southern District of California Case 96-00871-PB. Real estate assets in excess of $27 million squandered to pay $3 million in debts; unrelated partnerships were sold and proceeds were not paid to partners, according to the law; debts were satisfied more than four years prior yet trustee retains Keenan's estate until he signs pervasive release of all claims and allows trustee to retain $1 million for an additional five years.

In re John C. Lewis, in U.S. District Court, Western District of Washington at Seattle, Case 02-11147-SJS
Multimillion dollar estate processed under Ch 11, under a plan of liquidation managed by a U.S. Trustee appointed case trustee; Debtor contends estate squandered at far below market values and yet debtor is prohibited from personal living or counsel expense.

In re Donna Sturman, in U.S. District Court, District of New York, Case 89-11932-PCB
Heir to one quarter of parents approximate $100 million estate; placed in involuntary Ch 7 without any

service; case remains open with various compromises made in Donna's absence; Trustee took over non bankruptcy property where there have been fraud judgments against third parties resulting in prison sentences one example of arson where the trustee failed to purchase insurance; Donna and her two children remain homeless.